FILED BY CLERK
SEP -8 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CALMAT COMPANY dba VULCAN MATERIALS COMPANY, WESTERN DIVISION, Plaintiff/Counterdefendant/ Appellant/Cross-Appellee, v. WESTFALL INDUSTRIES, INC., Defendant/Counterclaimant/ Appellee/Cross-Appellant.	2 CA-CV 2007-0156 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20054739

Honorable Sarah R. Simmons, Judge

AFFIRMED IN PART
REVERSED IN PART AND REMANDED

Snell & Wilmer, L.L.P.
By Daniel McAuliffe, Andrew M. Jacobs, and Sarah K. Jezairian
Tucson
Attorneys for Plaintiff/ Counterdefendant/Appellant/ Cross-Appellee

McEvoy, Daniels & Darcy, P.C.
By Sally M. Darcy

Tucson
Attorneys for
Defendant/Counterclaimant/
Appellee/Cross-Appellant

H O W A R D, Presiding Judge.

¶1 Appellant/cross-appellee CalMat Co., dba Vulcan Materials Company (Vulcan) appeals from a judgment in favor of appellee/cross-appellant Westfall Industries, Inc. Vulcan argues, inter alia, that the trial court erred in entering judgment for Westfall on Westfall's claims for breach of contract and negligent misrepresentation because the jury awarded no damages on those claims. It also argues the court abused its discretion in denying Vulcan's post-trial motions because the evidence was insufficient to support the jury's damage awards on Westfall's claims for breach of the covenant of good faith and fair dealing and intentional misrepresentation. In its cross-appeal, Westfall contends, inter alia, that the court erred by refusing to award it liquidated damages on its breach-of-contract claim, despite the jury's finding of no damages.

¶2 Because both Vulcan and Westfall waived any challenge to the jury's inconsistent verdicts, we affirm the judgment on the breach-of-contract and negligent-misrepresentation claims. But because there was insufficient evidence of damages to support the verdicts for breach of the covenant of good faith and fair dealing and intentional misrepresentation, we reverse the judgment and remand this matter for a new trial on those

two counts. Our disposition makes it unnecessary to address the remaining issues the parties raise.

Facts and Procedural Background

¶3 We view the evidence in the light most favorable to sustaining the jury's verdicts. *See Kaman Aerospace Corp. v. Ariz. Bd. of Regents*, 217 Ariz. 148, ¶ 2, 171 P.3d 599, 601 (App. 2007). In 2005, Vulcan acquired a sand-and-gravel mine in Marana from New West Materials. At the time, New West had an agreement (Agreement) with Westfall under which Westfall would provide dust suppression (watering services) at the mine. When Vulcan acquired the mine, it assumed New West's rights and obligations under the Agreement, subject to certain conditions, including an amendment to the Agreement (Amendment).

¶4 Under the terms of the Agreement and Amendment, Westfall is entitled to perform watering services required at the mine for a term to expire in late 2011 and is entitled to the right of first refusal to perform other watering and nonwatering trucking or similar services. Westfall is paid an hourly rate for watering services, and the Agreement provides that the parties "expect and intend" that Westfall will provide a minimum of 168 hours of watering services per month. The hourly rate increases five percent per year and was $68.50 in 2005. The Agreement also contains a liquidated damages provision. Upon default by Vulcan, Westfall is entitled to cancel the contract and receive as liquidated damages the

hourly rate multiplied by 168 hours multiplied by twelve months per year for "the lesser of [the] balance of the Minimum Term . . . or four (4) years."

¶5 In addition to the Agreement, several other alleged agreements or representations are at issue in this case. After New West and Westfall negotiated the Agreement, but before Vulcan assumed it, a representative of New West prepared a Memorandum of Understanding (Fuel Agreement) providing that New West would make fuel available to Westfall for its water trucks at no charge. Vulcan was apparently unaware of the Fuel Agreement when it assumed the Agreement.

¶6 Additionally, Westfall presented evidence that Westfall had parked its trucks and stored other equipment on the mine property when New West owned it and that Vulcan had orally agreed to "accommodate" Westfall's need to park and store its equipment on Vulcan's property. After Vulcan assumed the Agreement, Westfall continued parking and storing its equipment on Vulcan's property. In 2005, Vulcan notified Westfall that it was in default of the Agreement by continuing to park and store equipment on Vulcan's site. But, as Westfall's owner Richard Westfall testified at trial, the trucks and equipment were still being stored on Vulcan's property at the time of trial.

¶7 Finally, in 2005, Vulcan and Westfall reached an agreement under which Westfall would provide a second water truck for additional watering services and be paid at $68.50 per hour to "provide and operate the second water truck." Although Westfall was

paid for every hour that truck was used, the parties disagreed on whether Westfall was entitled to the 168-hour minimum payment under the Agreement for the second water truck.

¶8 In 2005, Vulcan sued Westfall, claiming among other things that Westfall had breached the Agreement in a number of ways and Vulcan was entitled to cancel the Agreement. Westfall brought several counterclaims based on the Agreement, the Fuel Agreement, and Vulcan's representations to Westfall regarding parking and the second water truck. The case proceeded to trial. Before the case was submitted to the jury, Vulcan successfully moved for judgment as a matter of law on Westfall's breach-of-contract claim regarding the Fuel Agreement. The jury then found in favor of Westfall on all of Vulcan's claims. On Westfall's claims for breach of contract and negligent misrepresentation, the jury ultimately found in Westfall's favor but awarded "$0" in "liquidated damages" for breach of contract and "$0" in "full damages" for negligent misrepresentation. On Westfall's remaining claims, the jury also found in Westfall's favor, awarding $635,680 in damages for breach of the covenant of good faith and fair dealing and $24,881 in compensatory damages for intentional misrepresentation. The jury also awarded $306,111 in punitive damages for intentional misrepresentation.

¶9 Westfall later lodged a form of judgment consistent with the jury's verdicts, to which Vulcan objected, arguing in part that the jury's findings that there were no damages for breach of contract and negligent misrepresentation were fatal to those claims, that there was no evidence supporting the awards of compensatory damages on the remaining two

claims, and that the punitive damages award was excessive. In a response to Vulcan's objections, Westfall requested the trial court to order liquidated damages of $552,384 on the breach-of-contract claim in addition to the jury's award of $635,680 for the breach of the covenant of good faith and fair dealing. It otherwise requested judgment consistent with the jury's verdicts. The court agreed that it should award liquidated damages on the contract claim, reduced the punitive damages award to $223,929, rejected Vulcan's remaining contentions, and signed a judgment in favor of Westfall. Westfall also moved for attorney fees and expenses, which the court granted.

¶10 Vulcan then moved for a new trial, to amend the judgment, or for relief from judgment, reasserting most of the arguments made in its objection to the form of judgment and arguing the court erred in awarding liquidated damages on the breach-of-contract claim. The trial court agreed that it had erred in awarding the liquidated damages and amended the judgment on that claim "to return to the jury's original verdict." But the court otherwise denied Vulcan's motions and then signed an amended judgment in Westfall's favor. Vulcan appeals from that judgment, and Westfall cross-appeals.

Breach of Contract and Negligent Misrepresentation Verdicts

¶11 With respect to Westfall's claims for breach of contract and negligent misrepresentation, Vulcan argues the jury's verdicts were legally defective and asserts the trial court erred in failing to either grant a new trial or enter judgment as a matter of law in Vulcan's favor on these claims. In its cross-appeal, Westfall asserts that the jury's verdict

on the breach-of-contract claim entitles Westfall to liquidated damages and that therefore the trial court erred in reversing its decision to order liquidated damages. Neither party raised objections to the jury's verdicts with respect to damages before the jury was excused.

¶12 If a party believes a verdict is "inconsistent, defective, or nonresponsive" to the issue submitted to a jury, that party must move, pursuant to Rule 49(c), Ariz. R. Civ. P., to have the case resubmitted to the jury before the jury is excused. *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, ¶ 39, 48 P.3d 485, 493 (App. 2002). A party waives objection to any error on these grounds "by not objecting to the jury verdict when rendered." *Id.* ¶ 38; *see also Gonzalez v. Gonzalez*, 181 Ariz. 32, 35-36, 887 P.2d 562, 565-66 (App. 1994).

¶13 Here, the jury returned verdict forms on both claims, finding in favor of Westfall but awarding "$0" in damages. Vulcan asserts the verdicts cannot stand because damages are an essential element in both breach-of-contract and negligent misrepresentation claims. Westfall asserts that, as a matter of law, it is entitled to a liquidated damages award on the breach-of-contract claim, despite the jury having specifically found no damages. At trial, when the verdicts were read, neither party objected to the alleged inconsistencies regarding damages and neither party requested that the case be resubmitted to the jury pursuant to Rule 49(c) on these grounds.[1] The jury could have corrected any deficiency in

[1]When the jury verdicts were initially read, Vulcan objected pursuant to Rule 49(c) to the jury's failure to render any verdict at all on the negligent misrepresentation claim. The court then resubmitted the case to the jury. While the jury was deliberating for the second time, the court and the parties discussed the fact that the jury had awarded zero damages on the breach-of-contract claim but no formal objections were made. The jury then returned with a verdict on negligent misrepresentation in Westfall's favor with zero damages. The

the verdict and saved the courts the burden of another trial. *See Trustmark Ins.*, 202 Ariz. 535, ¶ 42, 48 P.3d at 494. Vulcan and Westfall have therefore waived these issues for purposes of appeal. *Id.* ¶ 38 (objection waived to verdict finding for plaintiff on negligence claim but awarding zero damages).

¶14 Vulcan relies on *Hall Family Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 916 P.2d 1098 (App. 1995), and *Gary Outdoor Adver. Co. v. Sun Lodge, Inc.*, 133 Ariz. 240, 650 P.2d 1222 (1982), in support of its position. But *Hall Family Properties* does not require a different result. Although the parties in that case had discussed the inconsistency in the verdict in the trial court, the court decided not to re-submit the case to the jury because one party objected. *Hall Family Props.*, 185 Ariz. at 385, 916 P.2d at 1101. Here, no one requested or objected to a re-submission. And *Gary Outdoor* is inapplicable because it does not involve an inconsistent jury verdict. 133 Ariz. at 241, 650 P.2d at 1223.

¶15 At oral argument, Vulcan contended the verdicts were not inconsistent, but rather were consistent based on its positions at trial. It reasoned we should order that a judgment be entered in its favor based on the jury verdicts. But in its opening brief it stated: "Where a jury purports to find in favor of a claimant but awards no damages on the claim, *the findings are in conflict* . . . ." (Emphasis added.) And it cited *Hall Family Props.*, 185 Ariz. at 387-88, 916 P.2d at 1103-04, for the following proposition: "[T]he trial court's order

---

parties raised no further challenges and the court excused the jury.

of a new trial where the jury had found in favor of the plaintiff but had awarded $0 was proper, because [the] verdict was inconsistent."

¶16 Vulcan cannot change its position merely because its former position now appears to have uncontemplated ramifications. And it has not claimed that *Hall Family Properties* is no longer good law. We therefore reject Vulcan's contention.

¶17 Vulcan also cites cases from other jurisdictions for the alternative propositions that inconsistent verdicts is a ground for a new trial or that "a verdict finding for a plaintiff but awarding no damages is actually a verdict for the defendant" as a matter of law. *See Baldwin v. Ewing*, 204 P.2d 430, 432 (Id. 1949); *Spectra Novae, Ltd. v. Waker Assocs., Inc.*, 914 P.2d 693, 696 (Or. Ct. App. 1996); *K&E Land & Cattle, Inc. v. Mayer*, 330 N.W.2d 529, 533 (S.D. 1983); *Calabrian Chems. Corp. v. Bailey-Buchanan Masonry, Inc.*, 44 S.W.3d 276, 282 (Tex. App. 2001). We note that *Spectra Novae* addresses only the issue of who is the prevailing party with respect to awarding attorney fees under a contractual provision when the jury finds a breach but no damages. 914 P.2d at 696. It does not support Vulcan's assertion that the court "should have ordered judgment for Vulcan on the claim of breach of contract." To the extent the other cases do support Vulcan's argument, they are inconsistent with Arizona law on waiver of the issue and we decline to adopt them.

¶18 Waiver for failure to object before excusing the jury is also determinative of Westfall's claim on cross-appeal that the trial court erred by adding and then removing the liquidated damages to the breach-of-contract verdict. Because Westfall waived any

irregularity in the verdict by not requesting that the jury be asked to reconsider before it was discharged, *see Trustmark Ins.*, 202 Ariz. 535, ¶ 39, 48 P.3d at 493, the trial court did not err in refusing to add the liquidated damages to the verdict. We thus affirm the trial court's entry of judgment on the breach of contract and negligent misrepresentation claims.

Implied Covenant of Good Faith and Fair Dealing

¶19 Vulcan next argues the trial court abused its discretion in entering judgment in Westfall's favor for breach of the implied covenant of good faith and fair dealing because there is no evidence in the record to support the jury's damage award. Vulcan raised this issue in a motion for a new trial.[2] We review the court's ruling on that motion for an abuse of discretion. *See Larsen v. Decker*, 196 Ariz. 239, ¶ 27, 995 P.2d 281, 286 (App. 2000). When reviewing the jury's verdicts, we will affirm the judgment so long as "any substantial evidence could lead reasonable persons to find the ultimate facts sufficient to support the verdict." *Gonzales v. City of Phoenix*, 203 Ariz. 152, ¶ 2, 52 P.3d 184, 185 (2002).[3]

¶20 The covenant of good faith and fair dealing is implied in every contract. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust*

---

[2]Vulcan also moved to amend the judgment, but in doing so was essentially asking the trial court to vacate the judgment and enter judgment in Vulcan's favor on this claim. This is not within the scope of relief contemplated by Rule 59(*l*), Ariz. R. Civ. P. *See Maganas v. Northroup*, 112 Ariz. 46, 48, 537 P.2d 595, 597 (1975) ("vacation of an adverse judgment" not permitted by Rule 59(*l*)).

[3]We note with disapproval that Westfall cites a depublished case for this proposition in its briefs. *See F.D.I.C. v. Adams*, 187 Ariz. 585, 593, 931 P.2d 1095, 1103 (App. 1996) ("depublished opinion has no precedential effect and cannot be cited as authority in any court").

Fund, 201 Ariz. 474, ¶ 59, 38 P.3d 12, 28 (2002). "The implied covenant of good faith and fair dealing prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement." *Id.* Contract damages are generally available for breach of the covenant and are part of the prima facie case. *See United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, ¶ 21, 128 P.3d 756, 762 (App. 2006). A party seeking contract damages must prove them "'with reasonable certainty.'" *ChartOne, Inc. v. Bernini*, 207 Ariz. 162, ¶ 39, 83 P.3d 1103, 1113 (App. 2004), *quoting Gilmore v. Cohen*, 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963). A damages award cannot be based on speculation. *Walter v. Simmons*, 169 Ariz. 229, 236, 818 P.2d 214, 221 (App. 1991).

¶21 Westfall claimed in its complaint Vulcan had breached the implied covenant of good faith and fair dealing by informing Westfall that it could no longer park its equipment on Vulcan's property, refusing to pay for fuel for Westfall's equipment, and failing to employ Westfall to perform nonwatering services. The jury awarded Westfall $635,680 in damages on the claim.

¶22 Westfall appears to argue on appeal that it presented evidence of actual damages based on its claims that Vulcan placed watering equipment on its property and failed to pay Westfall a second minimum of 168 hours per month even when Westfall no longer was using the second truck. But Westfall did not assert in its complaint that these alleged defaults were breaches of the covenant of good faith and fair dealing,[4] nor can the

[4]At oral argument, Westfall claimed it had incorporated each of the preceding allegations of its complaint into the count asserting breach of the covenant of good faith and

complaint be treated as having been amended to include those theories. *See* Ariz. R. Civ. P. 15(b). The joint pretrial statement simply lists as an issue whether Vulcan breached the covenant of good faith and fair dealing in its "dealings" with Westfall, which does not give notice of any expansion of the issue. And, although Westfall argued to the jury that Vulcan defaulted on the contract by placing watering equipment at the site and failing to pay Westfall 168 hours per month for the second water truck, it did not argue that these actions constituted a breach of the covenant of good faith and fair dealing. Finally, the jury instructions regarding breach of the covenant of good faith and fair dealing did not suggest what acts the jury was to consider in determining whether Vulcan had breached the covenant.[5] Thus, there is no "'affirmative showing in the record' that the unpleaded, disputed issue was reached." *Hill v. Chubb Life Am. Ins. Co.*, 182 Ariz. 158, 161, 894 P.2d 701, 704 (1995), *quoting Collison v. Int'l Ins. Co.*, 58 Ariz. 156, 162, 118 P.2d 445, 447 (1941). Accordingly, Westfall cannot rely on evidence presented in support of those alleged

---

fair dealing. These preceding allegations included the breach-of-contract claim regarding the second water truck. But generally incorporating allegations that Vulcan had breached the express contract provisions does not expand the claim that Vulcan had breached the covenant of good faith and fair dealing in three specific ways. And two of the three allegations of breach of the covenant were also specified as allegations of breach of the express contract, demonstrating Westfall made conscious decisions about which allegations belonged under which counts.

[5]In its post-trial motions, Westfall did not specifically claim that either the placement of the watering equipment or the failure to pay for the second water truck violated the covenant of good faith and fair dealing.

breaches of the Agreement to support the damages award for breach of the covenant of good faith and fair dealing.

¶23 Additionally, Westfall appears to argue that it presented evidence of actual damages based on its claim that Westfall never would have entered the Agreement absent Vulcan's alleged misrepresentations and, therefore, would still be working under the prior contract. Although that evidence may support a valid claim for misrepresentation, it does not support a valid claim for breach of the implied covenant of good faith and fair dealing of any contract to which Vulcan was a party. Additionally, Westfall is still being paid under the Agreement and does not explain what damages it actually has incurred by reason of this alleged breach. Therefore, any claim of actual damages based on this theory is too speculative to support the jury's award. *See Walter*, 169 Ariz. at 236, 818 P.2d at 221.

¶24 There is no other evidence of reasonably certain actual damages in the record regarding Westfall's claims for breach of the covenant of good faith and fair dealing. *See ChartOne*, 207 Ariz. 162, ¶ 39, 83 P.3d at 1113. Westfall has suffered no damages with respect to the parking issue because it continues to park its equipment on Vulcan's property. Moreover, Westfall presented no evidence of any specific nonwatering jobs it had not been offered or what it would have been paid for those jobs. Nor can it rely on the evidence of unpaid fuel costs because the trial court properly removed the Fuel Agreement from the jury's consideration. And, in any event, the alleged fuel damages were well below the $635,680 the jury awarded for breach of the covenant of good faith and fair dealing.

¶25 Westfall, however, argues in its brief that the jury's award is supportable as a "species" of liquidated damages under the contract, apparently based on the price to operate two water trucks. But, at oral argument, it conceded that it was not entitled to liquidated damages based on the breach of the covenant of good faith and fair dealing. And, as noted above, Westfall did not contend below that the issue of the second water truck provided a basis for finding a breach of the covenant of good faith and fair dealing. Additionally, as Vulcan notes, Westfall was required to cancel the Agreement in order to receive liquidated damages. It never did so. Therefore, under the Agreement's terms, Westfall could not avail itself of the liquidated damages provision, whether for breach of the Agreement or the covenant of good faith and fair dealing.[6] *See Schugg*, 212 Ariz. 133, ¶ 16, 128 P.3d at 761 (recovery of liquidated damages "limited by the express terms of the parties' agreement").

¶26 At oral argument, Westfall seemed to imply that it had cancelled the contract when it sent a notice of default to Vulcan. Westfall sent Vulcan two different letters that could be construed as notices of default. The first letter was sent by Westfall's attorney after Vulcan placed a water pull at the mine. The letter asserts Westfall's right of first refusal to provide watering services under the Agreement. The letter states in relevant part: "In the event that your company shall attempt to bypass the [Agreement] and my client's rights thereunder, my client will enforce the [Agreement] to the fullest extent possible." The second letter was apparently sent after Vulcan stopped paying for the second water truck.

---

[6]We further note that the agreement concerning the second truck does not mention any minimum usage.

This letter demands payment and states that if Vulcan fails to pay, Westfall "will pursue all legal remedies against [Vulcan]." Although both letters may contain an implicit threat to invoke the cancellation clause of the Agreement at some unspecified future time, neither letter states or implies that Westfall is actually cancelling the contract. And as conceded by both parties at oral argument, they are still performing under the contract.

¶27 Also at oral argument, Westfall claimed that all of the damages awarded are explainable by the jury's calculation of the amount Westfall was owed for Vulcan's failure to pay the monthly minimum for the second water truck, which the jury then allocated among the various verdict forms, including punitive damages. We find no merit to this argument for several reasons. First, the jury was instructed on the elements of each cause of action and instructed to reach a separate verdict on each. If Westfall is correct, the jury ignored the instructions and engaged in an improper jury process, requiring that all damage awards be vacated. *See Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 402, 949 P.2d 56, 62 (App. 1997) (we affirm jury verdict unless it shows, inter alia, . . . "'complete disregard of the . . . instructions'"), *quoting Welch v. McClure*, 123 Ariz. 161, 164, 598 P.2d 980, 983 (1979).

¶28 Second, Westfall's claim that Vulcan breached the contract by failing to pay the monthly minimum for the second water truck finds no support in the record. The Agreement provides that Westfall will be paid one minimum monthly amount of 168 hours. It admittedly has been paid that amount. The Agreement also provides that Westfall has the right of first refusal on other services Vulcan needs. Westfall was given that right of first

refusal. The Agreement does not provide that each additional agreement for services will have an additional monthly minimum for the entire term of the Agreement. And Westfall has not identified any other evidence supporting such a theory. Finally, Westfall admits these would not be liquidated damages, but cancellation of the contract and liquidated damages are its "sole remedy" under the Agreement. Westfall is not allowed to receive non-liquidated damages under the Agreement based on the second truck.

¶29 Additionally, although the memorandum concerning the second truck refers to Westfall's right of first refusal in the Agreement and to the process for accepting the offer in the Agreement, it does not incorporate the monthly minimum from the Agreement or independently provide for a separate monthly minimum for the second truck. And, again, Westfall did not identify any other evidence supporting this position.

¶30 At oral argument, Westfall also claimed it would be unjust to interpret the Agreement not to provide an additional monthly minimum because Westfall should not be required to have two or more pieces of equipment in service but only be paid for one. But Westfall admits it was paid for every hour the second truck was operated, so this interpretation does not limit its compensation to one monthly minimum.

¶31 Because the jury was presented with no evidence of actual damages allegedly resulting from Vulcan's breach of the covenant of good faith and fair dealing, and because Westfall was not entitled to liquidated damages, the damage award on that claim cannot stand. *See Gonzales*, 203 Ariz. 152, ¶ 2, 52 P.3d at 185 (jury verdict must be supported by

substantial evidence). Westfall failed to establish a prima facie claim for breach of the covenant of good faith and fair dealing, and its claim therefore failed as a matter of law. *See Schugg*, 212 Ariz. 133, ¶ 21, 128 P.3d at 762 (damages part of prima facie case for breach of covenant of good faith and fair dealing); *see also City of Glendale v. Farmers Ins. Exch.*, 126 Ariz. 118, 120, 613 P.2d 278, 280 (1980) (to avoid directed verdict, party must establish prima facie case). The trial court abused its discretion in denying Vulcan's motion for a new trial. *See Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 27, 156 P.3d 1149, 1155 (App. 2007) (court abuses discretion by committing error of law in reaching discretionary conclusion).

¶32 Vulcan asks us to order the trial court to grant judgment in its favor on this claim. But Vulcan never moved under Rule 50, Ariz. R. Civ. P., for judgment as a matter of law on this claim. Instead, it moved for a new trial under Rule 59, Ariz. R. Civ. P. That rule allows a trial court sitting without a jury to grant the motion and enter a different judgment, but it does not allow the court to do so after a jury renders a verdict. *See* Ariz. R. Civ. P. 59(b). Although this does not preclude Vulcan from raising on appeal the sufficiency of the evidence supporting damages, *see Dawson v. Withycombe*, 216 Ariz. 84, ¶ 38, 163 P.3d 1034, 1049 (App. 2007), it limits Vulcan's remedy to a new trial. *See Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 54 (1952) (concluding under federal rule that party who moved for new trial not entitled to judgment in its favor in absence of motion for judgment notwithstanding the verdict); *see also Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546

U.S. 394, 401-02 (2006) (reaffirming conclusion in *Johnson*); *Orme Sch. v. Reeves*, 166 Ariz. 301, 304, 802 P.2d 1000, 1003 (1990) (federal cases addressing federal counterparts to Arizona rules instructive and persuasive). Accordingly, we reverse the judgment on this claim and remand for a new trial.

Intentional Misrepresentation/Fraud

¶33 Vulcan also argues the trial court erred in entering judgment in Westfall's favor for Westfall's claim of intentional misrepresentation because, Vulcan contends, no evidence exists to support the jury's damages award of $24,881. Vulcan also raised this issue in its motion for new trial. We review the court's ruling on that motion for an abuse of discretion. *See Larsen*, 196 Ariz. 239, ¶ 27, 995 P.2d at 286. We will affirm a trial court's entry of judgment on the jury's verdicts so long as "any substantial evidence could lead reasonable persons to find the ultimate facts sufficient to support the verdict." *Gonzales*, 203 Ariz. 152, ¶ 2, 52 P.3d at 185.

¶34 A fraud claim consists of nine elements including a showing of a "consequent and proximate injury." *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, ¶ 18, 985 P.2d 556, 562 (App. 1998). Fraud must be proven by clear and convincing evidence that is sufficient to support each individual element, including damages. *Id.*; *see also Smith v. Don Sanderson Ford, Inc.*, 7 Ariz. App. 390, 392-93, 439 P.2d 837, 839-40 (1968). "'Fraud may never be established by doubtful, vague, speculative, or inconclusive evidence.'" *Echols v. Beauty*

Built Homes, Inc., 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982), *quoting In re McDonnell's Estate*, 65 Ariz. 248, 253, 179 P.2d 238, 241 (1947).

¶35 The factual basis for Westfall's intentional misrepresentation claim was Westfall's assertion that, in order to induce Westfall to sign the agreement, Vulcan promised that Westfall could park and store equipment on Vulcan's property. Westfall presented evidence that Vulcan threatened to repudiate this promise by demanding that Westfall remove his vehicles and equipment. But as we observed above, at the time of trial, Westfall was still parking and storing its equipment on Vulcan's property and had not suffered any actual damages.

¶36 Westfall did offer evidence of other damages at trial, totaling exactly $24,881, in support of a claim that Vulcan had breached a contractual agreement to provide fuel. As previously noted, the trial court removed the Fuel Agreement from the jury's consideration, at least with respect to the breach-of-contract claim. The parties disagree about whether the jury could consider evidence of Westfall's fuel costs with respect to other claims submitted to the jury. But we need not resolve that issue because, regardless of the applicability of this evidence to any other claim, Westfall's intentional misrepresentation claim was not predicated on a promise by Vulcan to pay fuel costs.[7] Thus, the purported fuel damages do

[7]We note Westfall has asserted that the jury asked if it could consider evidence of the fuel costs with respect to "other matters" and that the parties agreed this was permissible. Westfall provides no citation to the record for this factual recitation and we can find nothing to substantiate it. Nor did Westfall at oral argument point to any record support for that assertion.

not constitute a "consequent and proximate" injury of Vulcan's alleged misrepresentations. *Enyart*, 195 Ariz. 71, ¶ 18, 985 P.2d at 562.

¶37 Westfall suggests the jury could have found the fuel costs to be a form of indirect damages based on the following, somewhat attenuated, argument: Vulcan's predecessor, New West, was paying for Westfall's fuel; Westfall would not have consented to the assignment of the contract if Vulcan did not promise to provide parking; and, but for Vulcan's misrepresentations regarding parking, Westfall still would have a contract with New West, who would still be paying for Westfall's fuel. This reasoning is simply too "'doubtful, vague, speculative, [and] inconclusive'" to satisfy the damages element of fraud. *Echols*, 132 Ariz. at 500, 647 P.2d at 631, *quoting McDonnell's Estate*, 65 Ariz. at 253, 179 P.2d at 241. Because the record contains no substantial evidence of actual damages resulting from Westfall's allegations of Vulcan's intentional misrepresentation, and because damages are an essential element of that claim, we cannot sustain the jury's verdict. *See Gonzales*, 203 Ariz. 152, ¶ 2, 52 P.3d at 185. The trial court abused its discretion in denying Vulcan's motion for a new trial on this claim as well. *See Flying Diamond Airpark*, 215 Ariz. 44, ¶ 27, 156 P.3d at 1155 (court abuses discretion by committing error of law in reaching discretionary conclusion).

¶38 Vulcan requests that we either order judgment to be entered in its favor, or alternatively, that we remand for a new trial. But as with the breach of covenant of good faith claim, Vulcan moved only for a new trial below but did not move under Rule 50 for

judgment as a matter of law on this claim. For the reasons we discuss above, this limits Vulcan's remedy to a new trial. *See Johnson*, 344 U.S. at 54. Accordingly, we reverse the judgment on this claim and remand for a new trial.

¶39 Vulcan and Westfall both raise issues regarding the punitive damages award. The basis for the punitive damages award was the verdict in favor of Westfall on its intentional misrepresentation claim. Because we are reversing the judgment on that claim, we necessarily reverse the punitive damages award as well and do not address the related issues raised by either party on appeal and cross-appeal. *See Smith*, 7 Ariz. App. at 392-93, 439 P.2d at 839-40 (absent proof of actual damages, punitive damages wrongfully awarded).

¶40 At oral argument, Vulcan acknowledged that the aforementioned interaction between Rules 50 and 59 was correct. Vulcan also acknowledged that it had neither moved for a judgment as a matter of law below on Westfall's punitive damages claim nor objected to the trial court's instruction to the jury on that claim. Nonetheless, at oral argument, it requested that we not only vacate the award of punitive damages but direct the entry of judgment in its favor based on constitutional principles concerning punitive damages. It relies on *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 758 P.2d 1313 (1988). In that case, the supreme court examined for fundamental error an instruction issue which had not been raised below. *Id.* at 419-20, 758 P.2d at 1321-22. Although Vulcan cited *Bradshaw* for a different proposition in its brief and requested that we vacate or reduce the punitive damages award, it did not contend it was entitled to a directed entry of judgment in

its favor on this issue until oral argument. Arguments raised for the first time at oral argument are generally waived. *See Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 949-50 (App. 2004). And we see no issue of true constitutional proportions requiring us to make an exception here to this rule.

Attorney Fees

¶41 Vulcan argues the trial court erred in awarding fees and costs to Westfall asserting, inter alia, that Westfall was not the prevailing party. Because we are remanding with instructions to grant a new trial on the claims of intentional misrepresentation and the breach of covenant of good faith and fair dealing, and because the jury found no damages on the breach of contract and negligent misrepresentation claims, it is premature to determine who is the prevailing party. We therefore vacate the award of attorney fees and remand this issue to be decided by the trial court at the conclusion of the new trial.

Remaining Issues

¶42 Because we are remanding for a new trial, in our discretion we choose not to resolve the remaining issues raised by the parties on appeal and cross-appeal. These issues include Westfall's argument regarding evidence of a "significant land use change" as well as Vulcan's arguments that the court erred in not declaring the contract terminated; that the court erred in ordering eighteen percent interest on the judgments; and that the court erred in denying Vulcan's motion in limine to exclude certain evidence that Vulcan contends was prohibited under the parol evidence rule. We note, with respect to this last issue, that the

transcript of the hearing on the motion in limine is not included in the record on appeal. *See In re 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d 843, 846-47 (App. 2003) (appellant bears responsibility to include necessary parts of proceedings in record on appeal). Despite the fact that the issue regarding parol evidence is likely to recur on remand, we will not address the alleged error on an incomplete record.

Conclusion

¶43 In light of the foregoing, we affirm the judgment on the verdicts for breach of contract and negligent misrepresentation. We reverse the judgment on the verdicts for the claims of intentional misrepresentation and breach of the covenant of good faith and remand with instructions to grant a new trial on these claims. We also vacate the award of attorney fees, but the trial court may reconsider the issue at the conclusion of the new trial. In our discretion, we deny both parties' requests for attorney fees and costs on appeal.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
J. WILLIAM BRAMMER, JR., Judge